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No. 93-1135

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT PATRICK GUIMONT, ET AL., *Cross-Petitioners*,

v.

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT, *Cross-Respondent*.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a land use regulation, that substantially advances a legitimate state interest and does not deny the owner all economic use of the property or result in a physical invasion, may nevertheless be invalidated under the Takings Clause based on a non-fact specific facial claim that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public.

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STATEMENT

This case involves a challenge to the Mobile Home Relocation Assistance Act (the "Act") passed by the Washington Legislature to address the state-wide problem of relocation expenses associated with the closing of mobile home parks. The Washington Supreme Court ruled the Act violated substantive due process. The State of Washington through the Director of the Washington Department of Community Development has petitioned for a writ of certiorari seeking review of this ruling. The Washington Supreme Court also ruled that the Act was not unconstitutional under the Takings Clause. The cross-petition filed by Guimont and the other Cross-Petitioners seeks review of the takings ruling.

The basic facts about the operation of the Act and the procedural history of this case are set forth in the State's petition. Pet. 3-9. Of particular significance is the fact that this action involves a facial challenge to the validity of the Act. Guimont did not seek compensation for any alleged taking. Guimont sought only to invalidate the Act.

Indeed, Guimont did not challenge the application of the Act to any particular piece of property. *Guimont v. Clarke*, 121 Wash. 2d 586, 606, 854 P.2d 1 (1993). Pet. A-26. In this respect, the statement of the case in the cross-petition is potentially misleading. In it Guimont dwells on the experience of one of the intervenors, Bear Creek Associates. Res. Br. Opp. at 1-2.[1] However, this case does not concern the application of the Act to any specific piece of property, including that of Bear Creek.[2] This case presents solely a facial challenge to the Act.

ARGUMENT

The Washington Supreme Court has worked hard to develop a set of rules to reconcile the application of substantive

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[1] The statement of the case in Guimont's cross-petition incorporates the counter statement of facts contained in Guimont's Brief in Opposition. Cross-Pet. 3.

[2] In addition to intervening in this action, Bear Creek brought a separate action alleging that the Act was unconstitutional. *Bear Creek Assoc. v. Department of Community Dev.*, Thurston County Superior Court, Docket No. 91-2-00061-9. At this point, it is not clear whether Bear Creek's action represents a facial or "as applied" challenge to the Act. However, Bear Creek's intervention in this case did not change the facial challenge raised by Guimont.

due process and takings in the land use context.[3] Since the Washington Supreme Court has developed these doctrines together, Guimont argues that this Court should grant the cross-petition regarding takings, if it grants the State's petition regarding substantive due process. Cross-Pet. at 4-5. We agree. As we noted in the State's petition, there is significant confusion regarding the relationship between substantive due process and takings in the land use context. Pet. 22-25. This case presents the Court with an ideal vehicle to resolve this confusion and both the state and federal courts would benefit if this Court explained the relationship between these two doctrines.

While we agree that it would be appropriate to grant both petitions to resolve the confusion regarding the relationship between substantive due process and takings, we do not believe that the Questions Presented by Guimont have any particular

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[3] *See Orion Corp. v. State*, 109 Wash. 2d 621, 747 P.2d 1062, *cert. denied*, 486 U.S. 1022 (1988); *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990); *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, 113 S. Ct. 676 (1992); *Robinson v. Seattle*, 119 Wash. 2d 34, 830 P.2d 318, *cert. denied* 113 S. Ct. 676 (1992); and *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993).

significance in and of themselves. The Washington Supreme Court was correct in ruling that there is no taking in this case. The court below properly applied the takings decisions of this Court in analyzing the facial challenge to the Act.

1. The Washington Supreme Court Correctly Concluded That the Mobile Home Relocation Assistance Act is Not a Taking

The precedents of this Court establish two distinct classes of takings analysis. The first is physical occupation of the property. "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation." *Yee v. City of Escondido*, 503 U.S.___, 112 S. Ct. 1522, 1526 (1992). The second is a regulatory taking. The regulation of property may require compensation depending on "complex factual assessments of the purposes and economic effects of government actions." *Id.*

The complex factual assessment required for a regulatory taking claim may be avoided to some extent if the property owner makes only a facial challenge that presents no concrete controversy concerning the application of the law to any

particular piece of property. "The test to be applied in considering [a] facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land[.]'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). A facial challenge to an alleged regulatory taking can apparently also be based on the claim that "the ordinance does not 'substantially advance' a 'legitimate state interest' no matter how it is applied." *Yee*, 112 S. Ct. at 1532.

In this case the Washington Supreme Court concluded there was no physical or regulatory taking. First, there was no physical invasion of Guimont's property. "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 1528 (emphasis by the Court). The Washington Supreme Court correctly concluded that the Act imposes no such requirement because park owners have the right to voluntarily rent space and

to terminate the rental relationship. *Guimont v. Clarke*, 121 Wash. 2d at 608. Pet. A-29-30.

Second, Guimont's regulatory taking claim raised only a facial challenge. There was no regulatory taking because Guimont made no attempt to prove the Act denied the park owners all economically viable use of their property. *Id.* at 606. Pet. A-26. The Washington Supreme Court also correctly rejected Guimont's claim that the Act does not substantially advance legitimate state interests. The court said: "The State has a legitimate interest in addressing the statewide problem of relocation expenses associated with mobile home park closings. Making funds available to mobile home owners who are forced to relocate substantially advances that interest." *Id.* at 606 n.8. Pet. A-26.

Guimont claims that the court's analysis of this final point is inconsistent with the analysis in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Cross-Pet. 11-13. Guimont's argument is flawed because it misstates the basis of the Court's decision in *Nollan*. According to Guimont:

> This Court, in *Nollan*, recognized that the Coastal Commission had a *legitimate objective of providing greater public access along the beach* and that acquisition of more access furthered it. The means of acquisition employed, however, were improper. . . . The actual condition imposed was improper because it singled out the Nollans and required them to provide a benefit which should have been provided by the public as a whole.

Cross-Pet. 7-8 (emphasis added).

This was not the basis of the Court's decision in *Nollan*. Contrary to Guimont's assertion, in *Nollan* the state asserted that it had a legitimate state interest in "*protecting the public's ability to see the beach*, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront[.]" *Nollan*, 483 U.S. at 835 (emphasis added). However, the restriction imposed by the state required *access* to the beach rather than a *view* of the beach. Thus, the Majority concluded that it was "impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838.

The problem in *Nollan* was that the "condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. If the condition in *Nollan* had dealt with view rather than access, the Court likely would have concluded that there was no taking.[4]

In this case, unlike *Nollan*, there is a direct relationship between the closing of a mobile home park and the payment of relocation assistance to displaced homeowners. Guimont is simply wrong in asserting that *Nollan* established a test to determine whether a property owner is being singled out to provide a benefit that should be provided by the public as a

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[4] According to the Court in *Nollan*:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house–for example, a height limitation, a width restriction, or a ban on fences–so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional.

483 U.S. at 836.

whole. Indeed, the Court in *Nollan* specifically recognized that this was not the basis of the landowner's challenge.[5]

Of course, a property owner can raise a takings claim based on the allegation that a regulation unfairly singles out the land owner to bear a burden that should be borne by the public. However, such a claim must be raised in an "as applied" challenge that concerns a specific piece of property. As the Court said in *Yee*:

> But where the government merely regulates the use of property, compensation is required *only if considerations* such as the purpose of the regulation or the extent to which it deprives the

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[5] The Court said:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *But that is not the basis of the Nollans' challenge here.*

Id. at 835 n.4 (emphasis added, citations omitted).

> owner of the economic use of the property *suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. . . . [This] necessarily entails complex factual assessments* of the purposes and economic effects of government actions.

Yee, 112 S. Ct. at 1526 (emphasis added, citations omitted). In a facial challenge, such as the case at bar, it is simply not possible to conduct the "complex factual assessments" required to determine whether an individual landowner has been unfairly singled out. *Nollan* does not so hold.

2. This Court Should Grant Both the State's Petition and Guimont's Cross-Petition to Clarify the Relationship Between Takings and Substantive Due Process

Although the Washington Supreme Court was correct in concluding the Act does not result in a taking, we urge the Court to grant both the State's petition and Guimont's cross-petition. In the State's petition, we seek review of the unduly oppressive standard applied by the Washington Supreme Court in its substantive due process analysis. In raising the takings issue, the cross-petition offers the Court the opportunity to clarify how the test for substantive due process relates to the requirement of the

Takings Clause that a land use regulation substantially advance a legitimate state interest.

As we noted in the State's petition, there is substantial confusion regarding the relationship between substantive due process and takings. Pet. at 22-25. This confusion revolves around a number of unanswered questions.

First, is the test for substantive due process the same as the Takings Clause requirement that a land use regulation substantially advance a legitimate state interest? Speaking for the Majority in *Nollan*, Justice Scalia indicates that the tests are different. ("Contrary to Justice Brennan's claim . . . our opinions do not establish that these standards [substantially advance a legitimate state interest] are the same as those applied to due process or equal protection claims." *Nollan*, 483 U.S. at 834 n.3.) In his dissenting opinion Justice Brennan disagreed. ("Not withstanding the suggestion otherwise . . . our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one." *Id.* at 843 n.1.) In *Concrete Pipe & Prod. of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. ___, 113 S. Ct. 2264

(1993), the Court seems to say that the tests are the same or at least very similar. ("Given that Concrete Pipe's due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause." *Id.* at 2289, quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).)

Second, can the Takings Clause be used to invalidate a land use regulation when the landowner does not seek compensation? A regulation that violates substantive due process is unconstitutional and unenforceable. It is not clear whether this is also true of the Takings Clause. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), suggests that the Takings Clause applies to determine whether compensation is necessary. ("[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Id.* at 314.) On the other hand, *Yee* seems to say that even if there is compensation, a regulation may be struck down if it does not substantially advance a legitimate state interest. ("As *this allegation does not depend on* the extent to which petitioners are

deprived of the economic use of their property or *the extent to which these particular petitioners are compensated*, petitioners' facial challenge is ripe." *Yee*, 112 S. Ct. at 1532.) This question is directly relevant here since Guimont does not seek compensation. Guimont only seeks to invalidate the Act.

Finally, there is an additional question relating to remedy for violations of substantive due process and the Takings Clause. If a land use regulation violates substantive due process it is invalid. If the regulation violates the Takings Clause the government appears to have the option of paying compensation and "taking" the property. ("Once a court determines that a taking has occurred, the government retains the whole range of options already available–amendment of the regulation, withdrawal of the invalidated regulation, or [the] exercise of eminent domain." *First Lutheran Church*, 482 U.S. at 321.) Thus, in *Nollan* the State could have compensated the landowner in order to obtain access to the beach. Yet how can the government exercise its eminent domain power under the Takings Clause if the land use regulation also violates substantive due process?

The Washington Supreme Court and other courts have long struggled with these questions. They are important and complex. This Court can resolve these questions in this case. It presents an ideal vehicle because this case is essentially a simple one. It is a facial challenge to a statute and does not involve a complex factual record. It offers the Court the opportunity to establish a baseline for its substantive due process and takings analysis.

CONCLUSION

For the reasons stated above, the Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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